Nos. 82-1312, 82-1345 and 82-1346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UTAH POWER & LIGHT COMPANY and
THE MONTANA POWER COMPANY,
Petitioners

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents

ALABAMA POWER COMPANY, *et al.*,
Petitioners

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

PACIFIC GAS AND ELECTRIC COMPANY, *et al.*,
Petitioners

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF THE SACRAMENTO MUNICIPAL UTILITY DISTRICT, THE NORTHERN CALIFORNIA POWER AGENCY, AND THE CITIES OF ANAHEIM, AZUSA, BANNING, COLTON AND RIVERSIDE, CALIFORNIA AS AMICI CURIAE IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE ON BEHALF OF THE SACRAMENTO MUNICIPAL UTILITY DISTRICT, THE NORTHERN CALIFORNIA POWER AGENCY, AND THE CITIES OF ANAHEIM, AZUSA, BANNING, COLTON AND RIVERSIDE, CALIFORNIA IN OPPOSITION TO THE PETITIONS FOR A WRIT OF CERTIORARI

The Sacramento Municipal Utility District, the Northern California Power Agency, and the Cities of Anaheim, Azusa, Banning, Colton and Riverside, California hereby move for leave to file the attached brief *amici curiae* in opposition to the petitions for a writ of certiorari. The brief supports the position of the municipal electric utilities, and their association, which are private respondents in this proceeding.[1]

1. The *amici curiae* consist of the following entities, which are all municipalities within the meaning of Section 3(7) of the Federal Power Act, 16 U.S.C. § 796(7): (a) the Sacramento Municipal Utility District, Sacramento, California; (b) the Northern California Power Agency, a joint powers agency created pursuant to an agreement among various municipal utilities and one cooperative utility, which is an associate member, operating electrical distribution systems in northern and central California; and (c) the cities of Anaheim, Azusa, Banning, Colton and Riverside, California, all located in southern California. In this motion and the attached brief, the *amici curiae* are referred to collectively as "SMUD-Cal Cities."

2. The present proceeding concerns the interpretation of the hydroelectric licensing provisions of the Federal Power Act and, specifically, the issue whether the "municipal preference" contained in Section 7(a) of the Act applies as against the original licensee in a competitive relicensing proceeding. SMUD-Cal Cities are presently joint license applicants in two pending competitive relicensing proceedings at the Federal Energy Regulatory Commission which could turn on the application, *vel non*,

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[1] The Solicitor General has consented to the filing of this brief, as have the private respondents and the petitioners in Docket No. 82-1346. The other petitioners have withheld their consent.

of the municipal preference.[2] SMUD-Cal Cities, accordingly, have a clear and immediate interest in the outcome of this case.

3. As entities presently involved in competitive relicensing proceedings at the Commission, SMUD-Cal Cities are concerned that there be an expeditious, final and correct resolution of the municipal preference issue—either by a denial of the petitions for a writ of certiorari or, in the alternative, by a decision of this Court on the merits. License applications are costly and time-consuming to prosecute. SMUD-Cal Cities have prosecuted their two license applications in the belief that the Commission's 1980 decision in this case was correct and that, even if it were not, the matter would be settled finally within a reasonable time through judicial review.

Therefore, SMUD-Cal Cities are especially distressed by the recent extraordinary events at the Commission which are described in the Solicitor General's brief and which have prompted the request that the decision of the Court of Appeals be vacated and that the case be remanded to that court for some sort of "further proceedings." SMUD-Cal Cities vigorously oppose this request and will urge that after years of delay and uncertainty—and after thorough consideration of the issue by both the Commission and a federal court of appeals—vitally interested parties, like SMUD-Cal Cities, are now entitled to a prompt and definitive resolution of the municipal preference issue.

4. SMUD-Cal Cities submit that their participation will provide an additional perspective on the petitions for

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[2] One proceeding involves the Rock Creek-Cresta Project on the North Fork of the Feather River for which the original license, held by the Pacific Gas and Electric Company, expired on September 30, 1982. (FERC Project Nos. 3177 and 3223.) The other proceeding involves the Haas-Kings River Project on the North Fork of the Kings River for which the original license, also held by the Pacific Gas and Electric Company, will expire on March 31, 1985. (FERC Project No. 6729.)

a writ of certiorari which may be helpful to the Court and request, accordingly, that their motion for leave to file a brief *amici curiae* be granted.

Respectfully submitted,

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BRIEF OF THE SACRAMENTO MUNICIPAL UTILITY DISTRICT, THE NORTHERN CALIFORNIA POWER AGENCY, AND THE CITIES OF ANAHEIM, AZUSA, BANNING, COLTON AND RIVERSIDE, CALIFORNIA AS AMICI CURIAE IN OPPOSITION TO THE PETITIONS FOR A WRIT OF CERTIORARI

INTEREST OF THE AMICI CURIAE

As explained in the accompanying motion, the *amici curiae*, SMUD-Cal Cities, are municipal entities which have filed joint applications at the Federal Energy Regulatory Commission for two expiring hydroelectric project licenses presently held by a private investor-owned utility, the Pacific Gas and Electric Company. The outcome of these competitive relicensing proceedings could turn on the application, *vel non*, of the municipal preference of Section 7 of the Federal Power Act which is at issue in this case. SMUD-Cal Cities, accordingly, have a clear and immediate interest in the case.

SUMMARY OF ARGUMENT

The petitioners in this case seek review of a 1982 decision of the United States Court of Appeals for the Eleventh Circuit which affirmed a 1980 decision of the Commission. In that case, the Commission held that the municipal preference of Section 7(a) of the Federal Power Act "is applicable to all relicensing proceedings in which States or municipalities, and citizens or corporations, request successor licenses for the same water resources." (Pet. App. at 23.)[1]

It is SMUD-Cal Cities' position that the decisions below were correct, and that the petitions for a writ of certiorari may properly be denied on the ground that there is no substantial legal issue for this Court to resolve. In the event that a writ of certiorari is nonetheless granted, however, SMUD-Cal Cities urge this Court—in the interests of expedition and finality for the parties, and judicial economy for the courts—to decide the case on the merits.

The Solicitor General has recommended that the decision of the Court of Appeals be vacated and the case remanded to that court for "further proceedings." (S.G. Br.

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in Docket No. 82-1345.

at 10.)[2] Yet he has not suggested the existence of error, or even of new evidence; nor has he offered any other acceptable rationale for that course of action. His recommendation, to the contrary, is based solely on the fact that the composition of the Commission has changed since the time of the agency's decision and that the new Commissioners apparently have advised him of their readiness to overrule the prior decision. (S.G. Br. at 8-10.) This extraordinary justification is not only unprecedented and without foundation in law but, in any event, could not override the strong interests of finality, expedition and economy which require a decision on the merits if a writ of certiorari is granted.

These views are explained in more detail below.

ARGUMENT

I. CERTIORARI SHOULD BE DENIED BECAUSE THE RESULT BELOW WAS CLEARLY CORRECT

The statute at issue in this case is Section 7(a) of the Federal Power Act. It provides:

> "In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region . . . ." 16 U.S.C. § 800(a).

The issue that has been raised by petitioners, which are private investor-owned utilities, is whether this "municipal preference" applies in the context of a competitive relicensing proceeding when the original licensee is a party and seeks to obtain a new license for the same project.

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[2] "S.G. Br." refers to the Solicitor General's Brief.

They claim that it does not. They claim, moreover, that the original licensee has an unwritten, but allegedly "natural," preference in a relicensing proceeding over any competing applicant, even if that applicant is an otherwise preferred state or municipality. As indicated, however, the Commission—on the basis of a thorough and meticulous analysis of the issue (Pet. App. at 14-78)—has held that the municipal preference does apply in such a competitive relicensing situation. And the Court of Appeals below unanimously affirmed that decision.

SMUD-Cal Cities believe that the result below is so clearly correct as to present no substantial legal issue.[3] They further believe that it is important that the Court recognize that the result below was in no sense aberrational. It was fully supported by the language and structure of the Federal Power Act, as well as by its legislative history, and also was consistent with the overall policy favoring public ownership of public resources which Congress adopted in the law.

The language and structure of the Act. The result below is wholly consistent with, and indeed was required by, the clear language and structure of the licensing provisions of the Federal Power Act. Section 7(a) expressly provides that in each of the three instances that it covers —(1) "issuing preliminary permits," (2) issuing "licenses where no outstanding preliminary permit has been issued," and (3) "issuing licenses to new licensees under section 15"—the Commission is obliged to give preference to applications by states and municipalities if their plans are, or are made, equally well adapted to conserve and

[3] There is no conflict of the circuits here, nor is there any conflict with any decision of this—or for that matter, any other—Court. Indeed, the only other judicial ruling on the issue, which was made contemporaneously with the enactment of the Federal Power Act, held that the "state or municipality under Section 7 is given the preferential right over the original licensee to a renewal of the license." *Alabama Power Co.* v. *Gulf Power Co.*, 283 F. 606, 617 (M.D. Ala. 1922).

utilize in the public interest the water resources of the region. In the third instance, Section 15 of the Act—entitled "New Licenses and Renewals-Compensation of Old Licensee"—expressly covers relicensing.[4] There is nothing whatever in Section 7(a) to suggest that a special exception to the preference exists for original licensees in competitive relicensing cases.

The private utilities, throughout the course of this proceeding, have advanced various grammatical arguments in an effort to avoid the obvious meaning of the statute. The central argument of this kind involves the claim that an "original licensee"—even when it receives a "new license" under Section 15—somehow cannot be a "new licensee" within the meaning of Section 7(a). But the recipient of this "new license"—whether the existing licensee or a competing applicant—is clearly the "new licensee" as contemplated in Section 7(a). Use of different terms in Section 15—such as "original licensee" and "new licensee"—was necessary simply to distinguish the

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[4] Section 15 provides, in pertinent part:

"That if the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 hereof, the commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do, in the manner specified in section 14 hereof: Provided, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid." 16 U.S.C. § 808(a).

competing applicants for the purposes of that section since, for example, the consequences differ depending on whether the existing licensee or the competing applicant receives the new license.[5]

Moreover, even under the petitioners' interpretation of the words "new licensee" in Sections 7(a) and 15 of the Act, the municipal preference must still be applicable in competitive relicensing proceedings involving the original licensee. In every such situation, the Commission must decide whether to issue the new license to the original licensee or the competing applicant, which in all cases would be a "new licensee." Thus, the municipal preference by its terms is applicable in competitive relicensing proceedings against the original licensee, even if the words "new licensee" are construed to exclude original licensees competing for new licenses.

As the Court of Appeals found, moreover, petitioners' theories of alleged "limited preference" are not only inconsistent with the statute's structure, but they also lead to absurd results:

> "To follow the petitioners' theory of a 'limited preference' in favor of municipalities and states against new applicants only when incumbent licensees are not competing changes the statute's entire preference structure. Instead of the two preferences outlined above applying to all cases, the preferences would operate only in some cases. We are not convinced that Congress intended such a result, which would cause administration of the Act by the Commission to be confusing and sporadic. Likewise, the adoption of a 'limited preference' advantages incumbent licensees and thus leads to an absurd result. Under this theory, the only time a license holder would fail to obtain reissuance of a license would be when the water project was not profitable. Thus, states and

[5] A new license issued to the competing applicant, *inter alia*, "may cover any project or projects covered by the original license" and is conditioned upon the compensation of the original licensee.

> municipalities realistically would have no preference at all because a preference to a losing project is worthless. Petitioners' position would lead to even more absurd results where the state or municipality was the license holder. By reapplying for the license, the state or municipality would lose its preference." (Pet. App. at 10.)

The private utilities' claims in this regard have been correctly, and persuasively, rejected at every stage of the proceeding. (Pet. App. at 7-10, 55-61.)

The legislative history of the Act. The result below is also consistent with, and fully supported by, the legislative history of the relevant provisions of the Federal Power Act. As the Commission made amply clear in its opinion below, there simply was no doubt at the time of the enactment of the municipal preference that it would apply in competitive relicensing proceedings involving the original licensee. (Pet. App. at 31-44, 61-68.) Although there were many very clear statements to the same effect, the clearest may be that of O.C. Merrill, conceded to be the principal draftsman of the law, and of Congressman Lee, a member of the conference committee, who both agreed that:

> "In the development of water powers by agencies other than the United States, the bill gives preference to State and municipalities over any other applicant, both in the case of new developments and in case of acquiring properties of another licensee at the end of a license period." (Pet. App. at 44.)

Merrill further advised the President immediately prior to the time the President signed the bill into law, that:

> "For development by agencies other than the United States preference is given to States and municipalities. A similar preference is given for the acquisition of the properties of other licensees at the end of a license period. (Pet. App. at 44.)

This, of course, is exactly what is at issue here: the application of preference "at the end of a license period."

The public use policy of the Act. Finally, the result below is also fully consistent with the water resources policy that Congress adopted in the Federal Power Act.[6] As the Commission's opinion below explained:

> "Congress [in 1920] envisioned probable private development of water power resources with ultimate public ownership possible. The FWPA was enacted at a time when private interests were prepared to proceed to a much greater extent than the federal, State and local governments were, with financing and building hydropower projects. Congress concluded at the time the FWPA was passed that the public interest would best be served by rapid development of water power resources—by private or public entities—leaving the possibility of transfer of the hydro-facilities from private to public ownership at a later date should the Commission determine that the public interest could equally well be served by the public entities assuming ownership and the right to operate facilities." (Pet. App. at 73.) (Footnote omitted.)

To a considerable extent, this is exactly what has happened since 1920. And although the private utilities that have benefitted—for many decades now—from the use of public water power resources may now wish that the law embodied a different policy, the fact is that it does not. The justification for private use of public resources—to facilitate their development—has passed, and the basic and underlying policy of public use of public resources which Congress itself established now should be allowed to come into play.

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[6] *See e.g.* Sen. Rep. No. 180, 66th Cong., 1st Sess. (1919) (*quoted in* Pet. App. at 40).

II. IF CERTIORARI IS GRANTED THE CASE SHOULD BE DECIDED ON ITS MERITS

As explained above, SMUD-Cal Cities believes that the petitions for a writ of certiorari may properly be, and should be, denied on the ground that the result below was so clearly correct that the case presents no substantial issue for resolution. In the event that a writ of certiorari is granted, however, SMUD-Cal Cities urges the Court to decide the case on its merits and not to remand it, as has been requested by the Solicitor General.

The question presented here, as the Court of Appeals noted, is "a purely legal question" (Pet. App. 1)—namely, the interpretation of Section 7(a) of the Federal Power Act. No issue of fact or discretion is involved. Nor can "policy" play any role in this case—except insofar as it was set by Congress in the Act. As the Commission itself said in its decision below:

> "[T]he principal question to be decided is not the policy issue of whether it is factually or politically wise for States and municipalities to have a relicensing preference against citizen and corporation licensee-applicants, but the legal issue of whether Congress included such a preference in Section 7 when it enacted the FWPA in 1920." (Pet. App. at 23.)

The legal issue has been fully, indeed exhaustively, briefed and argued both before the Commission and in the Court of Appeals. No party has suggested the existence of any "new evidence" that would bear upon the issue. What remains is only for the issue to be finally and definitively resolved. This Court, and only this Court, can provide that resolution.

There is, moreover, a pressing need for prompt resolution of the municipal preference issue. SMUD-Cal

Cities' licensing proceedings, like many others at the Commission, have already been pending for years. In one of those cases, in which a competing application was on file as early as October 1980, the license has already expired without a relicensing decision. The license is now being renewed on an annual basis—to the considerable economic benefit of the existing licensee and to the detriment of SMUD-Cal Cities as the competing applicants. Despite its multi-year pendency, this particular case has not even been set for hearing yet. And it is by no means unusual. The fact is that the Commission's competitive relicensing process has come to a virtual halt as the result of continuing uncertainty about the proper role of the municipal preference in relicensing cases. Additional delay in settling the merits of this issue, especially now that the matter could be decided by this Court, would be wholly unjustifiable.[7]

Finally, in the event that a writ of certiorari is granted, judicial economy also will be served by a decision of this Court on the merits. As all the parties' briefs will surely indicate to the Court, the issue here is not one likely to be abandoned by losers at a lower level of the judicial system. If the issue is not authoritatively resolved now, it gives every promise of having to be resolved authoritatively later. Thus, postponement will not only prejudice parties, like SMUD-Cal Cities, who seek an expeditious resolution of the question; it will also result in unnecessary duplication of judicial effort, certainly in this Court if not in other courts as well.

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[7] As this Court has recently recognized in a not dissimilar context, requiring utilities to proceed in expensive licensing proceedings while potentially controlling legal issues remain unresolved "would impose a palpable and considerable hardship on the utilities, and may ultimately work harm on the citizens" in their service areas. *Pacific Gas and Electric Company* v. *State Energy Resources Conservation and Development Comm'n*, —— U.S. ——, 51 U.S.L.W. 4449, 4452 (April 20, 1983).

III. THE CASE SHOULD NOT BE REMANDED UNDER ANY CIRCUMSTANCES

The Solicitor General has suggested that the writ of certiorari be granted in this case but that this Court, rather than considering the case on its merits, should vacate the judgment of the Court of Appeals and remand the case to that court for "such further proceedings as that court deems appropriate." (S.G. Br. at 10.)

The Solicitor General does not assert that any error, either substantive or procedural, was committed by the Commission or by the Court of Appeals, but offers the following as the basic justification for this extraordinary suggestion:

> "Following the filing of the instant petitions for certiorari, the Commission met for the purpose of formulating its recommendation to the Solicitor General concerning the Commission's response to the petitions. We are informed that at this meeting, a majority of the Commissioners, four of whom were appointed after the issuance of Opinion Nos. 88 and 88A [the municipal preference opinion and the opinion denying rehearing of the matter], expressed their disagreement with the Commission's earlier position in those orders." (S.G. Br. at 8.)

According to the Solicitor General, the case has been complicated by the facts "that the Commission now wishes to reconsider the case, and that a majority of the Commissioners appear to be ready to overrule Opinion Nos. 88 and 88A and adopt the contrary position." (S.G. Br. at 9.)

It has been the policy of this Court to examine for itself the issues involved in a request that the decision of an appellate court be vacated, even where error is confessed. *See, e.g., Sibron* v. *New York*, 392 U.S. 40, 58-59 (1967); *Young* v. *United States*, 315 U.S. 257, 258-59 (1941). That policy should apply with even greater force

here where no error is confessed, and where the request is not only extraordinary but also quite obviously at odds with very basic principles pertaining to the finality, if not the integrity, of the adjudicative process. In this situation, it would be particularly inappropriate for the Court to vacate summarily the Court of Appeals decision without giving the parties an opportunity fully to brief and argue the issue.

The fact is that nothing relevant to the legal issue in this case—which is the only issue in the case—has changed since the time that the Commission, and the Court of Appeals, rendered their final decisions. The relevant provisions of the Federal Power Act remain unchanged as, of course, does the legislative history of those provisions. The pertinent canons of construction and tests for ascertaining legislative intent also remain unchanged. There have been no relevant intervening decisions of this, or any other, Court. And a review of the exhaustive briefing in the case should convince the Court that every argument that could possibly have been made, was made.

All that has changed, as the Solicitor General seems to concede, is the composition of the Commission. Four of the present Commissioners were not involved in the decision sought to be reconsidered. We are aware of no precedent, however, for the proposition that a change in the membership of an administrative agency is a basis for vacating and reconsidering the decision of an admittedly legal (and not political) issue [8] which has already been the subject not only of a final agency ruling but of a final

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[8] As we have noted, the Commission and the Court of Appeals both described the issue as legal. And neither the petitioners' briefs nor that of the Solictior General offers any different characterization of it. The Solicitor General says that the case presents "a highly significant question of statutory construction concerning the scope of the state and municipal preference on relicensing in Section 7(a) of the Federal Power Act." (S.G. Br. at 8.)

court of appeals adjudication as well. The Solicitor General, we note, has cited no such precedent.

As we explained in Part II above, there are genuine and substantial reasons, involving both finality and economy of litigation, why this Court should decide the present case on its merits if a writ of certiorari is granted. There are, by contrast, no plausible reasons why the matter, at this stage, should be remanded for reconsideration either by the Court of Appeals or by the Commission. If the Court believes that the issue in the case is significant, and difficult, enough to warrant the grant of the writ of certiorari, the Court should decide the case on its merits, and settle the matter once and for all.

CONCLUSION

For the foregoing reasons, the *amici curiae*, SMUD-Cal Cities, request that the petitions for a writ of certiorari be denied and, in the alternative, if they are not denied, that the case be set for decision on the merits.

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